89-1209

No. 89-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY,
Petitioner,

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether an advisory opinion of a federal agency interpreting federal statutes but having no binding effect on any person's rights and obligations thereunder in any pending or future legal proceeding is a final order subject to judicial review, is ripe for judicial review, or presents a case or controversy under Article III of the Constitution.

2. Whether section 3 of the Hobbs Act, 28 U.S.C. § 2343, which provides for venue in the judicial circuit in which the petitioner resides or has its principal office or in the District of Columbia Circuit, permits an unincorporated association with nationwide activities to petition for review of an agency order in any judicial circuit it chooses.

LIST OF PARTIES

The parties to the proceedings below, in adddition to those listed in the caption, are respondents FRVR Corporation, the Interstate Commerce Commission, and the United States.

Petitioner Chicago and North Western Transportation Company is a wholly owned subsidiary of CNW Corporation, which is wholly owned by Chicago & North Western Acquisition Corp., which is wholly owned by Chicago & North Western Holdings Corp. Union Pacific Corporation holds 100% of the non-voting UP preferred stock issued by Chicago & North Western Holdings Corporation. Petitioner Chicago & North Western Transportation Company has the following subsidiaries apart from wholly owned subsidiaries: Iowa Transfer Railway Company, Kansas City Terminal Company, MT Properties, Inc., Peoria & Pekin Union Railway Company, Trailer Train Company, and Transportation Data Exchange, Incorporated.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES: Page

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner Chicago and North Western Transportation Company respectfully requests that the Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The court of appeals issued two opinions in this case. The first opinion (App. 5a-7a) is reported at 861 F.2d 1082 (1988). Following that decision, this Court granted petitions for certiorari filed by petitioner and respondent (Nos. 88-1706 and 88-1874), vacated the judgment of the court of appeals, and remanded the case for further consideration in light of *Pittsburgh & Lake Erie Railroad* v. *Railway Labor Executives' Association*, 109 S. Ct. 2477 (1989). 109 S. Ct. 3209 (1989). The court of appeals' subsequent order (App. 1a-2a) is reported at 888 F.2d

1227 (1989). The order of the Interstate Commerce Commission (App. 10a-29a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 30, 1989. (App. 1a-2a.) No party sought a rehearing. The jurisdiction of this Court to review the judgment of the court of appeals is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. U.S. Const. Art. III, Sec. 2 provides in relevant part:

> "The judicial Power shall extend to all Cases, In Law and Equity, arising under * * * the Laws of the United States * * *; —to Controversies to which the United States shall be a Party; * * *."

2. 28 U.S.C. § 1391 (1982) provides in relevant part:

> "§ 1391. Venue generally.
>
> * * *
>
> "(b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, or in which the claim arose, except as otherwise provided by law.
>
> "(c) A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes.
>
> * * *
>
> "(e) A civil action in which a defendant is * * * an agency of the United States, or the United States, may, except as otherwise provided by law, be brought in any judicial district in which * * * (4) the plain-

tiff resides if no real property is involved in the action."

3. Section 2 of the Administrative Orders Review Act ("Hobbs Act"), 80 Stat. 622, as amended, 28 U.S.C. § 2342 (1982 and Supp. V. 1987), provides in relevant part:

> "§ 2342. Jurisdiction of court of appeals
>
> "The court of appeals (other than the United States Court of Appeals for the Federal Circuit), has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of—
>
> * * *
>
> "(5) all rules, regulations or final orders of the Interstate Commerce Commission made reviewable by section 2321 of this title and all final orders of such Commission made reviewable under section 11901(j)(2) of title 49, United States Code.
>
> "Jurisdiction is invoked by filing a petition as provided in section 2344 of this title."

4. Section 3 of the Administrative Orders Review Act, 80 Stat. 622, 28 U.S.C. § 2343 (1982), provides:

> "§ 2343. Venue
>
> "The venue of a proceeding under this chapter is in the judicial circuit in which the petitioner resides or has its principal office, or in the United States Court of Appeals for the District of Columbia Circuit."

STATEMENT OF THE CASE

1. *The Commission's opinion.* This case arises out of proceedings before the Interstate Commerce Commission ("ICC" or "the Commission") related to the sale by petitioner Chicago & North Western Transportation Company ("C&NW") of 208 miles of railroad track in Wisconsin, known as the "Duck Creek South" lines, to FRVR

Corporation ("FRVR"), a newly formed company which was not a rail carrier. In December 1987, C&NW and FRVR obtained authorization for the sale pursuant to the Commission's *Ex Parte No. 392"* procedure under §§ 10505 and 10901 of the Interstate Commerce Act ("ICA"), 49 U.S.C. §§ 10505 & 10901.[1] Simultaneously, the companies filed a petition with the ICC seeking a declaratory order "clarifying the agency's jurisdiction over labor issues arising out of transactions authorized by the Commission, including section 10901 transactions within the scope of [*Ex Parte No. 392*]." In particular, the petition asked the ICC to state its views on whether "its jurisdiction * * * displaces the Railway Labor Act and the Norris-LaGuardia Act with respect to labor issues arising out of the transactions authorized by the Commission under the Interstate Commerce Act, even where the Commission finds that labor protective conditions are contrary to the public interest." Respondent Railway Labor Executives' Association ("RLEA") opposed this petition.

The ICC issued an opinion on January 29, 1988, responding to the petition for clarification. (App. 10a-29a). The Commission noted that its purpose in issuing the opinion was to provide "private parties and reviewing courts" with "a clear statement of the Commission's viewpoint" on the statutory accommodation issues (App. 18a). The ICC concluded that application of the bargaining provisions of the Railway Labor Act ("RLA") or the Norris-LaGuardia Act ("NLGA") to *Ex Parte No. 392* line sales would interfere with the Commission's statutory authority and with the scheme for revitalization of marginal railroad lines established in *Ex Parte No. 382*. The Commission noted "the importance of this

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[1] See Ex Parte No. 392 (Sub-No. 1), *Class Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C. 10901*, 1 I.C.C.2d 810 (1985), *aff'd mem. sub nom. Illinois Commerce Comm'n* v. *ICC*, 817 F.2d 145 (D.C. Cir. 1987).

agency's role in reconciling the conflicts between public need for an efficient transportation system (including the need for fair and equitable labor relations) and the private disputes that arise invariably from consolidations and restructurings within the rail system." (App. 21a.) The Commission asserted that it had "inherent powers to impose labor protection where necessary to ensure labor equity," and, as mandated by Congress, had administered the Interstate Commerce Act "as a part of the complex of laws governing labor relations in the rail industry." (*Id.*) Rail labor had participated and could continue to participate in ICC proceedings to determine labor protection. Because the ICA gave the Commission exclusive and plenary jurisdiction over the sale, abandonment, and merger of rail lines, however, the preemption of other law, including other labor law, was necessary to protect the Commission's expert resolution of rail industry problems. (App. 22a-24a.) Thus, the Commission concluded:

> "As with all adversarial proceedings those which come before the Commission generate winners and losers, but it must also be clear that participants ought to, after exhausting lawful appeals aimed at our authority and reasonableness, be reconciled to the process. Allowing a dispersion of authority will compound the problems to the detriment of the public and the transportation system. In the matter at hand, it cannot be doubted that a strike to prevent ICC-approved abandonment is susceptible to injunction. But it is now contended that such a strike can be used to prevent the development of an advantageous alternative to abandonment, despite the fact that Commission jurisdiction over these two types of restructuring is, in all relevant aspects, identical. Our expertise and experience, combined with our system-wide responsibilities, lead us to the conclusion that neither the public nor labor is adequately protected by encouraging a system that prefers abandonment to rejuvenation. We do not believe the law is so structured as to compel that outcome." (App. 24a.)

3. *Proceedings in the court below.* On February 19, 1988, RLEA filed a petition for review in the Eighth Circuit, invoking the court's jurisdiction under the Administrative Orders Review Act (the "Hobbs Act"), 28 U.S.C. §§ 2341 *et seq.*[2] RLEA contended that the Commission did not have authority to issue the declaratory order and, moreover, that the order incorrectly stated the law. C&NW and FRVR were granted leave to intervene as respondents. C&NW moved to transfer the case to the District of Columbia Circuit, because 28 U.S.C. § 2343 restricts venue of a proceeding to review an ICC order to "the judicial circuit in which the petitioner resides or has its principal office," or the District of Columbia Circuit, and RLEA both resides and has its principal office in Washington, D.C.[3] The ICC

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[2] Except in circumstances not relevant here, "a proceeding to enjoin or suspend * * * [an] order" of the ICC "shall be brought in the court of appeals as provided by and in the manner prescribed in" the Hobbs Act. 28 U.S.C. § 2321(a). The Hobbs Act confers exclusive jurisdiction on the courts of appeals to set aside or determine the validity of "final orders" of the ICC "made reviewable by" § 2321. *Id.* § 2342. A party aggrieved by a "final order reviewable under" the Hobbs Act "may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies." *Id.* § 2344.

[3] C&NW submitted with its motion two complaints recently filed by RLEA in state and federal trial courts and an RLEA publication entitled "The History of the Railway Labor Executives' Association"; in these documents, RLEA stated that it is an unincorporated association of the chief executive officers of virtually all of the nation's rail labor unions and that its principal office is located in Washington, D.C. (Motion To Transfer To Appropriate Venue, Feb. 24, 1988, Attachments A, B, and C.) The "History" further explained that RLEA functions as a "coordinating and policymaking body on legislative and other matters of importance to railway workers, including issues pending before government agencies," but that it does not represent employees in collective bargaining. *Id.*, Attachment C, at 3.

In its response to C&NW's motion, RLEA conceded that it is an unincorporated association with its principal office in the District

joined in this motion, and the court referred it to the merits panel. C&NW also argued that the petition for review should be dismissed for lack of jurisdiction, contending that the ICC advisory opinion was not a "final order" subject to judicial review.

The Eighth Circuit neither transferred nor dismissed the petition. On November 21, 1988, the court issued an opinion in which it held that "it is for this Court, not the Commission, to decide whether the Railway Labor Act and the Norris-LaGuardia Act must be accommodated to the authority of the Commission under section 10901 of the Interstate Commerce Act * * *." 861 F.2d at 1083 (App. 6a). On those questions, the court "adhere[d]" to its decision in *Burlington Northern Railroad* v. *United Transportation Union*, 848 F.2d 856 (8th Cir. 1988), that the RLA must be accommodated to the ICC's authority to impose labor protective conditions in line sales " 'insofar as this authority is necessary to "assure fair wages and working conditions," ' " but that the NLGA did not have to be similarly accommodated, since "there is 'no inherent incompatibility' " between the ICC's authority and the application of the NLGA. 861 F.2d at 1083 (quoting *Burlington Northern*, 848 F.2d at 864) (App. 6a). In a separate unreported judgment, the court stated that the ICC's declaratory order was "affirmed as clarified by this Court." (App. 8a).

Both the C&NW and the RLEA filed petitions for certiorari and asked that the petitions be held pending this Court's decision in *Pittsburgh & Lake Erie Railroad* v. *Railway Labor Executives' Association*, 109 S. Ct. 2584

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of Columbia, but claimed that it "resides" in the Eighth Circuit for purposes of § 2343. (RLEA Memorandum In Opposition to Motion to Transfer, Mar. 11, 1988, at 1-3.) It claimed residence in the Eighth Circuit not because some employees affiliated with its member unions reside there, but on the argument that an unincorporated association "resides" for purposes of § 2343 everywhere that it "does business," and that RLEA does business in the Eighth Circuit by representing the interests of employees who reside there. (*Id.* at 3, 7.)

(1989) (*"P&LE"*). After this Court decided *P&LE*, it granted both petitions, vacated the judgment of the court of appeals, and remanded the case for further consideration in light of *P&LE*. 109 S. Ct. 3209 (1989).

On October 30, 1989, the Eighth Circuit issued an order stating that "we adopt the suggestion of the United States as set forth in the letter brief of the Department of Justice and set aside *in toto* the declaratory ruling by the Interstate Commerce Commission," and "reiterate our opinion * * * that it is for the courts, not the Commission, to decide whether the Railway Labor Act and the Norris-LaGuardia Act must be accommodated to the authority of the Commission under section 10901 of the Interstate Commerce Act." 888 F.2d at 1228. (App. 2a.)[4]

3. *Related proceedings.* The abstract issues that were the subject of the Commission's *FRVR* opinion have been presented concretely in other proceedings dealing with the parties' rights and obligations in connection with the Duck Creek South line sale. RLEA twice petitioned the ICC to impose labor protection on the C&NW as a condition on the ICC's authorization of the sale under the ICA. The Commission denied the petitions, and RLEA has sought review of those orders in the District of Columbia Circuit, where the matter is still pending.[5]

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[4] The Justice Department's letter asserted that the ICC's "declaratory ruling" was wrong as to both the RLA and the NLGA, and that "[*a*]*ssuming that* [*the ICC's*] *declaration had any legal effect,*" a question on which the letter did not elaborate, the ICC decision should be set aside. (App. 4a; emphasis added.)

[5] F.D. 31205, *FRVR Corp.—Acquisition & Operation Exemption—Chicago & N.W. Transp. Co.* (served Feb. 28, 1989), *petition for review pending, Railway Labor Executives' Ass'n* v. *ICC*, No. 89-1183 (D.C. Cir. Mar. 15, 1989); F.D. 31206, *Itel Rail Corp. and Intel Corp.—Continuance in Control Exemption—FRVR Corp.* (served Sept. 12, 1988), *petition for review pending, Railway Labor Executives' Ass'n* v. *ICC*, No. 88-1793 (D.C. Cir. filed Nov. 9, 1988).

Meanwhile, the issues as to the parties' actual rights and duties under the RLA and the NLGA with respect to the Duck Creek South line sale, and the question of how those statutes should be accommodated to the ICA for purposes of this transaction, are now pending in the Seventh Circuit. In March 1988, a federal district court in Chicago granted C&NW's motion for a preliminary injunction barring the unions from striking and denied RLEA's motion for a preliminary injunction barring the sale. The Seventh Circuit affirmed. *Chicago & North Western Transp. Co.* v. *Railway Labor Executives Ass'n*, 855 F.2d 1277 (7th Cir. 1988). The court of appeals held that the parties' dispute about the Duck Creek South line sale constitutes a "minor dispute" that is subject to compulsory arbitration under § 3 of the RLA and is therefore within the exclusive jurisdiction of the National Railroad Adjustment Board. *Id.* at 1282-86. The court further held that strikes should be enjoined in order to insure that the RLA arbitration can be accomplished and that the NLGA did not proscribe such an injunction. *Id.* at 1286-87.[6] Finally, the court held that, because the case involves a minor dispute, the district court did not have jurisdiction to issue a "status quo" injunction barring the line sale, and that the district court did not abuse

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[6] Under the RLA, "minor disputes" over the application or interpretation of collective bargaining agreements or matters omitted from formal agreements but governed by established relation between carriers and their employees are distinguished from "major disputes" over proposed changes in collective bargaining agreements. See, *e.g.*, *Consolidated Rail Corp.* v. *Railway Labor Executives' Ass'n*, 109 S. Ct. 2477, 2479-82 (1989); *Elgin, J. & E. R.R.* v. *Burley*, 325 U.S. 711, 723 (1945). Courts lack jurisdiction over minor disputes because such disputes are committed to mandatory arbitration before adjustment boards established under § 3 of the RLA. See, *e.g.*, *Union Pacific R.R.* v. *Sheehan*, 439 U.S. 89, 94 (1978). Strikes over minor disputes violate the RLA and, notwithstanding the NLGA, may be enjoined by a federal court to effectuate the compulsory arbitration before the adjustment boards. See, *e.g.*, *Brotherhood of Railroad Trainmen* v. *Chicago R. & I. R.R.*, 353 U.S. 30, 40-42 (1957).

its discretion by declining to condition the strike injunction on the C&NW's abstention from consummating the sale. *Id.* at 1287-88. Because its holdings were based upon the RLA, the Seventh Circuit deemed it unnecessary to reach C&NW's further argument that the strike also should be enjoined in order to protect the ICC's exclusive jurisdiction to authorize the line sale. *Id.* at 1288 n.6. On November 28, 1988, this Court denied RLEA's petition for certiorari. 109 S.Ct. 493 (1988). The sale of the Duck Creek South line was then consummated on December 9, 1988.

The district court later granted the C&NW's motion for partial summary judgment on the minor dispute issue, permanently enjoining strikes over the line sale, dismissed the RLEA's status quo claims, and defined the issue to be arbitrated. *Chicago & North Western Transp. Co.* v. *Railway Labor Executives' Ass'n*, No. 88 C 444 (N.D. Ill. Oct. 11, 1989). Appeals from that order are now pending in the Seventh Circuit.

REASONS FOR GRANTING WRIT

This case presents the important issue whether federal courts should review declaratory orders of federal agencies that have no effect on anyone's rights and are essentially advisory in character. By entertaining a petition to review such an order, the decision below conflicts squarely with decisions of two other circuits and this Court that such declaratory opinions are not "final orders" within the jurisdiction of the courts of appeals under the Hobbs Act, 28 U.S.C. § 2342, nor "final agency action" reviewable under the Administrative Procedure Act, 5 U.S.C. § 704; and with a decision of the District of Columbia Circuit that such decisions are not ripe for judicial review. The decision below also conflicts with decisions of this Court as to justiciability under Article III of the Constitution. It is important for this Court to provide guidance on the issue, lest the lower federal

courts devote scarce judicial resources to abstract disputes wholly unsuited for judicial resolution.

This case also presents an important question, not heretofore addressed by the Court, about the application of the residence requirement in the venue provisions of the Hobbs Act and other federal venue statutes to entities with nationwide activities seeking review of administrative decisions. The court below entertained RLEA's petition for review, in which venue was predicated on the claim of RLEA, an unincorporated association, that it "resides" wherever it "does business." By that reasoning, however, RLEA may seek review of ICC decisions in any of the twelve federal circuits, because its activities are nationwide. That construction of the residency requirement conflicts with decisions in three other circuits and would allow many associations—and indeed corporations—to shop nationwide for the most favorable court in which to seek review, even though the petitioner has no other connection to the chosen venue.

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS AND THIS COURT THAT, FOR PRUDENTIAL, STATUTORY, AND CONSTITUTIONAL REASONS, AGENCY ADVISORY OPINIONS LACK SUFFICIENT FINALITY AND RIPENESS TO BE SUBJECT TO JUDICIAL REVIEW.

1. The Hobbs Act provides courts of appeals with jurisdiction to review "final orders" of the ICC and other agencies. 28 U.S.C. § 2342. The decision of the court below to review the *FRVR* opinion ignores the statute's requirement of finality, is squarely in conflict with decisions of the Fifth and Seventh Circuits, and is contrary to this Court's interpretation of finality under the Hobbs Act and the Administrative Procedure Act.

The ICC's *FRVR* opinion does not itself determine any rights or obligations or have any legal consequences

for the parties, either in this proceeding or more generally. The opinion does not purport to order anyone to do anything or to enjoin anyone from doing anything. The parties are in the same position they would have been in had the opinion not been issued: the question of the authorization of and appropriate labor protection for the sale is pending in the District of Columbia Circuit upon review of *other* ICC orders that do adjudicate the parties' rights; and the question of the application of the RLA and the NLGA to the transaction is pending in the Seventh Circuit, where no party has argued that its rights have been determined with any legal effect by the Commission's *FRVR* opinion. The Commission plainly indicated that its only purpose in issuing the opinion was to provide "private parties and reviewing courts with a clear statement of the Commission's viewpoint" on an issue "related to the discharge of explicit statutory power," the Commission's "power to approve or exempt the sale of a line of railroad." (App. ——.) As such, the opinion constitutes a reasoned and considered statement by the ICC on a matter within the agency's expertise, but it does not itself determine any rights or obligations or have any legal effect.

The decision below, exercising jurisdiction to review the ICC declaration, directly conflicts with *City of Miami* v. *ICC*, 669 F.2d 219 (5th Cir. 1982), and *American Trucking Association* v. *United States*, 755 F.2d 1292 (7th Cir. 1985). In *City of Miami*, the ICC had issued a declaratory order that a particular ocean terminal facility was a "line of railroad" under the ICA and thus was subject to the ICC's regulatory jurisdiction. Because no other ICC proceedings concerning the line were pending, however, the opinion was merely advisory and had no legal effect on the parties. The City of Miami petitioned for review, arguing that the ICC had no power to issue the order and that its decision was erroneous on the merits. The Fifth Circuit dismissed the petition for review on the grounds that there was no final order:

> "The ICC Order in the present case does not determine any 'rights or obligations,' nor do any 'legal consequences . . . flow from the [ICC's] action.' *Port of Boston* [*Terminal Ass'n* v. *Rederiaktiebolaget Transatlantic*], 400 U.S. [62,] at 71, 91 S. Ct. at 209 [(1970)]. The order neither permits nor prohibits abandonment of the FEC terminal. Moreover, the Commission's decision does not purport to enjoin either [the terminal owner] or the City from taking any action with respect to the subject property, nor does it have any legal effect on either party's position in [pending state and federal actions]. Though styled a 'declaratory order,' the Commission's action is nothing more than an advisory ruling * * *." 669 F.2d at 221-22 (footnote omitted).[7]

American Trucking Association likewise involved an ICC opinion that had no direct legal effect on the parties: the court explained that the proceeding was more of an "educational undertaking" intended, as here, to "'promote certainty [and] clear the air.'" 755 F.2d at 1296 (quoting the ICC opinion). The Commission's opinion did not

> "purport to announce rules of law nor * * * impose an obligation, determine a right or liability or fix a legal relationship. They merely state[d] or restate[d] in a general and expository way certain conclusions drawn by the Commission * * * and suggest[ed] reasons for those conclusions." *Id.* at 1297.

For this reason the court held that ICC's opinion was not a "final order" subject to judicial review under the Hobbs Act. *Id.* at 1293.[8]

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[7] The court noted that the ICC had filed suit in a federal district court to enjoin the alleged unlawful abandonment of the rail line, but the district court had an "obligation independently to determine whether such facilities are [a] 'line of railroad.' Thus, the ICC order has no effect on the pending federal court action." 669 F.2d at 222 n.11.

[8] In an alternative holding, the court also found the order not ripe for review, 755 F.2d at 1297-98.

The decision below also conflicts with decisions of this Court holding that agency actions that do not fix the rights and duties of any party are not final orders subject to judicial review. In *Port of Boston Marine Terminal Association* v. *Rederiaktiebolaget Transatlantic*, 400 U.S. 62 (1970), construing the finality requirement under the Hobbs Act, this Court said that "finality" depends, among other things, on "whether rights or obligations have been determined or legal consequences will flow from the agency action." *Id.* at 71.[9]

So too, in considering the comparable finality requirement for judicial review under the Administrative Procedure Act [10], this Court has held that a "direct and immediate" effect on the industry's operations, with "the status of law" demanding "immediate complinace" is the *sine qua non* of "final agency action." *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 149, 152 (1967). The *FRVR* opinion lacks the binding impact on the parties that this Court has recognized distinguishes a reviewable final order from an unreviewable abstract statement of agency policy.

2. The decision below also conflicts directly with the decision by the D.C. Circuit in *Railway Labor Executives Association* v. *ICC*, 883 F.2d 1079 (D.C. Cir. 1989), which dismissed a petition for review of an almost identical ICC order because it was not ripe for judicial

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[9] The courts of appeals, including the Fifth Circuit in *City of Miami*, have applied the "legal consequences" test from *Port of Boston*. See *Intercity Transp. Co.* v. *United States*, 737 F.2d 103, 106 (D.C. Cir. 1984); *Florida Pub. Serv. Comm'n* v. *ICC*, 724 F.2d 1460, 1462 (11th Cir. 1984); *City of Miami*, 669 F.2d at 221.

[10] The Administrative Procedure Act limits judicial review to "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. The courts of appeals have interpreted the final action requirement identically under this statute and the Hobbs Act. See *American Trucking Ass'n* v. *United States*, 755 F.2d at 1293, 1296; *Intercity Transportation Co.* v. *United States*, 737 F.2d at 106 n.3.

review. In that case, the Commission approved the consolidation of two rail carriers and declared that the transaction would be exempted from the requirements of the RLA. RLEA sought review in the D.C. Circuit, arguing in part that the ICC's approval of the transaction does not discharge a carrier's duties to comply with the RLA, and that the ICC lacked authority to decide that its authorization of a transaction exempted the carriers from their obligations under other laws.

The court held that these questions were not ripe for review. The court observed that § 11341(a) of the ICA, 49 U.S.C. § 11341(a), provides an exemption only "as necessary to let [a participant in a transaction] carry out the transaction * * *." The need for an exemption in a particular transaction requires factual determinations "that can only be made by a tribunal faced with a claim that a transaction will violate a law * * *." 883 F.2d at 1082. Thus, the court concluded, "the ICC may consider a question of exemption, and make the 'necessity' determination, when the issue is properly before it." *Id.* That issue was not yet before the Commission:

> "[T]he ICC has not determined—and was not asked to determine—whether an exemption from the RLA was necessary to effectuate the UP-MKT consolidation. Rather, when approving the consolidation, the Commission merely restated the statutory scope of section 11341(a) without making any factual findings. Nor did the Commission purport to make findings about necessity that would foreclose future labor union arguments that the exemption did not attach to a particular operating change. It is therefore clear that the ICC's blanket pronouncement that the UP-MKT transaction is exempt from the RLA has no present or future legal force or effect. And because it is without effect, the Commission's pronouncement fails both prongs of the ripeness test: it is neither fit for judicial review, nor will the parties suffer any hardship as a result of postponing

review." *Id.* at 1083 (citing *Abbott Laboratories*, 387 U.S. at 148-49).

The court below faced the same situation in this case. The ICC's *FRVR* opinion has no "present or future legal force or effect." The opinion is not a binding order that of its own force decides whether the RLA must be accommodated to the ICA in the Duck Creek South transaction. The legal issues discussed in the order, as they arise concretely in connection with the Duck Creek South transaction, are being decided elsewhere in the pending cases before the District of Columbia and Seventh Circuits.

The decision below is also irreconcilable with *Abbott Laboratories* v. *Gardner*. There, the Court stated:

> "[I]t is fair to say that [the ripeness doctrine's] basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." 387 U.S. at 148-49.

The Court then set out a two-part methodology for determining whether a case is fit for review, stating that "[t]he problem is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Id.* at 149. Considered in the light of these standards, the *FRVR* opinion is not ripe for review.

First, the matter is not presently fit for judicial decision. As already shown, the *FRVR* opinion is not "final agency action" with the force of law and subject to judicial review. See *Abbott Laboratories*, 387 U.S. at 149-52. Review of the opinion "entangl[ed]" the court below "in

abstract disagreements over administrative policies." *Id.* at 148.[11]

Second, there is no "hardship to the parties [from] withholding court consideration." *Abbott Laboratories*, 387 U.S. at 149. The *FRVR* opinion does not "require[] an immediate and significant change in [RLEA's] conduct of [its] affairs with serious penalties attached to noncompliance * * *." *Id.* at 153. RLEA is not in a position of complying with the *FRVR* order or facing sanctions; indeed, RLEA has not alleged any concrete harm or threat of harm resulting from the ICC order.

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[11] For this reason, the issue raised by the Justice Department in its brief below, see *supra* n.4, whether the ICC correctly interpreted the law in the *FRVR* opinion, is not ripe for review. The Seventh Circuit properly declined to decide whether the ICA preempts the RLA in this transaction, because no conflict between the statutes was presented. *Chicago & North Western Transp. Co.* v. *Railway Labor Executives Ass'n*, 855 F.2d at 1288 n.6. Similarly, in *P&LE*, this Court did not reach the RLA preemption issue because it found that the RLA did not impose obligations in that case that conflicted with the ICA and the ICC's authorization of the sale thereunder. 109 S. Ct. at 2592-97. The Court explained:

> "[W]e 'are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.' We should read federal statutes 'to give effect to each if we can do so while preserving their sense and purpose.'" *Id.* at 2596 (citations omitted).

Accordingly, a judicial determination whether the RLA and the NLGA must be accommodated to requirements of the ICA should not be made in the absence of a conflict between the requirements of the statutes in an actual case. The lack of such conflict makes this case like *Pacific Gas & Electric Co.* v. *State Energy Resources Conservation & Development Commission*, 461 U.S. 190 (1983), where the Court held that the question whether federal law preempted a California statute regulating the storage of nuclear waste was not ripe for review, because it was uncertain whether the state agency charged with administration of the statute would ever apply it to a concrete case. 461 U.S. at 203.

Thus, the ICC order does not have a "sufficiently direct and immediate" impact upon the RLEA so "as to render the issue appropriate for judicial review at this stage." *Id.* at 152.[12]

3. Since the *FRVR* opinion has no legal force or effect, there are constitutional impediments to judicial review as well: the review proceeding did not amount to a "Case" or "Controversy" within the meaning of Article III.[13] Because the ICC is an executive agency, Article

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[12] For this reason, neither the question whether the courts or the ICC should "decide" the statutory accommodation issues—which the court below addressed, see *supra* p. 8—nor the question whether the *FRVR* opinion interprets these statutes correctly—which the Department of Justice addressed in its brief below, see *supra* n.4—is ripe for judicial review. The ICC did not purport to "decide" the statutory accommodation issues; or to challenge the right of the courts to do so when appropriately before them for decision. Rather, the ICC's stated purpose was to provide "private parties and reviewing courts" with "a clear statement of the Commission's viewpoint" on these issues (App. 18a). The question of the ICC's authority to issue the opinion, even if purely legal, is nonetheless not ripe for review, because it fails the second prong of the *Abbott Laboratories* test. "[T]he test of ripeness * * * depends not only on how adequately a court can deal with the legal issue presented, but also on the degree and nature of the regulation's present effect on those seeking relief." *Toilet Goods Ass'n* v. *Gardner*, 387 U.S. 158, 164 (1967). In that case, the Court found the issue of the agency's power to issue a regulation not ripe, in part because the agency had not yet applied the regulation, and thus the "impact of the administrative action" was not "felt immediately by those subject to it in conducting their day-to-day affairs" and "no irremediable adverse consequences flow from requiring a later challenge to this regulation." *Id.* The Commission's power to issue the *FRVR* opinion, which did not purport to have any legal effect, falls in this category. In *Railway Labor Executives Ass'n* v. *ICC*, the D.C. Circuit also faced a challenge to the ICC's statutory authority to enter an order purporting to exempt a transaction from RLA, but held it not ripe for review under the *Abbott Laboratories* test. 883 F.2d at 1081-83.

[13] The Court has observed that, "because issues of ripeness involve, at least in part, the existence of a live 'Case or Controversy,'"

III did not prevent it from issuing the *FRVR* advisory opinion.[14] Nonetheless, Article III does prevent a federal court from reviewing that opinion, since no legal rights are at stake in the court's disposition. Thus, the Court has stated:

> "The requirements of Art. III are not satisfied merely because a party requests a court of the United States to declare its legal rights, and has couched that request for forms of relief historically associated with courts of law in terms that have a familiar ring to those trained in the legal process. * * * The power to declare the rights of individuals and to measure the authority of governments, this Court said 90 years ago, 'is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy.' *Chicago & Grand Truck R. Co.* v. *Wellman*, 143 U.S. 339, 345 (1892)." *Valley Forge Christian College* v. *Americans United for Separation of Church & State*, 454 U.S. 464, 471 (1982).

Because the *FRVR* opinion considers abstract issues and hypothetical statutory conflicts which have not arisen in this case, judicial review of the opinion does not present a justiciable controversy. See *Babbitt* v. *United Farm Workers Nat'l Union*, 442 U.S. 289, 303-05 (1979) (constitutional challenge to provisions of state farm labor statute does not pose actual case or controversy and judicial ruling would be "wholly advisory" where application of statutory provisions is hypothetical). "For a declaratory judgment to issue, there must be a dispute which 'calls, not for an advisory opinion upon a hypothetical

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the courts "must determine whether the issues are ripe for decision in the 'Case or Controversy' sense" even if all parties seek review. *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 138 (1974). See also *Poe* v. *Ullman*, 367 U.S. 497, 501 (1961).

[14] See *ECEE, Inc.* v. *FERC*, 645 F.2d 339, 349-50 (5th Cir. 1981); *Tennessee Gas Pipeline Co.* v. *FPC*, 606 F.2d 1373, 1380 (D.C. Cir. 1979); *Gardner* v. *FCC*, 530 F.2d 1086, 1090-91 (D.C. Cir. 1976).

basis, but for an adjudication of present right upon established facts.'" *Ashcroft* v. *Mattis*, 431 U.S. 171, 172 (1977) (quoting *Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227, 242 (1937)). RLEA sought from the court below "a mere declaration in the air" on an abstract issue, insufficient for the exercise of federal judicial power. *Giles* v. *Harris*, 189 U.S. 475, 486 (1903) (Holmes, J.). Accordingly, the court below lacked jurisdiction over RLEA's petition for review.

4. In view of the conflict in the circuits and the tendency of some courts, exemplified by the court below, to reach out to decide issues in the absence of a concrete dispute as to someone's legal rights, this Court should provide guidance concerning the circumstances in which judicial review of declaratory orders is warranted. Federal courts have enough to do without adjudicating appeals from advisory dissertations by administrative agencies. Premature judicial intervention "leads to piecemeal review which at the least is inefficient and upon completion of the agency process might prove to have been unnecessary." *FTC* v. *Standard Oil Co.*, 449 U.S. 232, 242 (1980) (citations omitted).

II. THE DECISION BELOW REFUSING TO TRANSFER THE CASE TO THE DISTRICT OF COLUMBIA CIRCUIT CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS AND, BY PERMITTING ORGANIZATIONS WITH NATIONWIDE ACTIVITIES TO SEEK REVIEW OF AGENCY DECISIONS IN ANY JUDICIAL CIRCUIT, RAISES AN IMPORTANT QUESTION OF STATUTORY CONSTRUCTION THAT SHOULD BE RESOLVED BY THIS COURT

The Hobbs Act provides for venue "in the judicial circuit in which the petitioner resides or has its principal office, or in the United States Court of Appeals for the District of Columbia Circuit." 28 U.S.C. § 2343. C&NW filed a motion with the court below, in which the ICC

joined, to transfer the proceeding to the District of Columbia Circuit, on the ground that RLEA neither "resides" nor "has its principal office" anywhere within the Eighth Circuit. The court referred the motion to the merits panel, which proceeded to entertain the petition.

RLEA conceded below that it is an unincorporated association with its principal office in the District of Columbia. Further, it disclaimed any argument that it "resides" for purposes of § 2343 wherever employees represented by its member unions reside.[15] It argued instead that an unincorporated association "resides" for purposes of § 2343 everywhere that it "does business," and that RLEA does business in the Eighth Circuit by representing the interests of employees who reside there. Indeed, RLEA's petition for review stated that it "represents rail employees nationwide, including employees who reside in this Circuit." (Petition for Review at 2.)

By accepting venue asserted on that basis, the court below put itself in direct conflict with decisions of three other courts of appeals. Moreover, the decision below, which has implications far beyond its facts, is inconsistent with the statutory language and contrary to important federal policies underlying the venue requirements.

1. Three courts of appeals have expressly rejected the argument that the Hobbs Act permits a petition for re-

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[15] The courts of appeals have squarely rejected the argument that an unincorporated association "resides" wherever any of its members resides for purposes of venue under the Hobbs Act. *International Bhd. of Elec. Workers* v. *ICC*, 832 F.2d 91, 92 (7th Cir. 1987); *American Newspaper Publishers Ass'ns* v. *United States Postal Serv.*, 789 F.2d 1090, 1092 (5th Cir. 1986); *American Civil Liberties Union* v. *FCC*, 774 F.2d 24, 26 (1st Cir. 1985). In *Denver & Rio Grande Western Railroad* v. *Brotherhood of Railroad Trainmen*, 387 U.S. 556, 559-60 (1967), the Court held that when an unincorporated association is sued, venue under 28 U.S.C. § 1391(b) "should be determined by looking to the residence of the association itself rather than that of its individual members."

view to be filed in the judicial circuit in which the petitioner merely does business. The leading case is *American Civil Liberties Union* v. *FCC*, 774 F.2d 24 (1st Cir. 1985), involving a petition for review by a membership corporation. The court explained:

> "The applicable venue statute * * * contains no provisions for 'doing business' as a basis for venue. Cf. the Labor Management Relations Act, 29 U.S.C. § 160(f) (a petition for review may be filed wherever the petitioner resides, transacts business, or where the practice complained of took place). Given the particularly narrow wording chosen by Congress in Section 2343, there is simply no basis to conclude that Congress intended to endow membership corporations with a choice of venue unavailable to other petitioners. To so hold would, moreover, sanction unlimited forum-shopping by membership corporations, a practice we are loath to encourage." *Id.* at 26.

The Fifth and Seventh Circuits have reached the same conclusion. See *International Bhd. of Elec. Workers* v. *ICC*, 832 F.2d 91, 92-93 (7th Cir. 1987); *American Newspaper Publishers Ass'ns* v. *United States Postal Serv.*, 789 F.2d 1090, 1091-92 (5th Cir. 1986).[16]

2. RLEA's argument that it "resides" for purposes of § 2343 wherever it does business would make it redundant for the statute also to place venue in the circuit in which the petitioner "has its principal office." A corporation or unincorporated association always does business where it has its principal office. *E.g.*, *Frazier* v. *Ala-*

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[16] In *International Brotherhood of Electrical Workers* the court rejected an attempt by an RLEA member union, which itself was an unincorporated association, to secure review in the Seventh Circuit of an ICC rail regulation decision; the court transferred the suit to the District of Columbia Circuit, where the union had its principal office. 832 F.2d at 92, 93.

bama Motor Club, 349 F.2d 456, 460 (5th Cir. 1965).[17] RLEA's interpretation would read the "principal office" clause entirely out of the statute, "in violation of the elementary cannon of construction that a statute should be interpreted so as not to render one part inoperative." *Colautti* v. *Franklin*, 439 U.S. 379, 392 (1979). See also *Mountain States Tel. & Tel. Co.* v. *Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985); *United States* v. *Menasche*, 348 U.S. 528, 538-39 (1955).[18]

3. The venue issues in this case have implications reaching far beyond the facts in this case and the statutory venue provision that is at issue. Although this case involves an unincorporated association, resolution of the venue issue herein will also necessarily determine where a corporation "resides" for purposes of venue under the Hobbs Act. Indeed, RLEA's argument to the court below was that a corporation can bring a petition under the Hobbs Act wherever it does business, and that an unincorporated association should be treated the same way.[19] In addition, resolution of this case will implicate where a

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[17] "The reference to the 'principal office' of the petitioner [in § 2343] assumes that each petitioner has but one 'principal' office. This language parallels 'principal place of business' in 28 U.S.C. § 1332(c), defining a corporation's citizenship for purposes of diversity jurisdiction. * * * Section 2343 designates even more clearly the headquarters of the firm." *International Bhd. of Elec. Workers* v. *ICC*, 832 F.2d at 92.

[18] Section 2343 was adopted in 1950, 64 Stat. 1130, and slightly revised and renumbered in 1966, 80 Stat. 622. The legislative history does not discuss this language. See *International Bhd. of Electrical Workers* v. *ICC*, 832 F.2d at 92 (citing H.R. Rep. 2122, 81st Cong., 2d Sess. (1950); S. Rep. 2618, 81st Cong., 2d Sess. (1950)).

[19] RLEA principally relied upon *Denver & Rio Grande Western Railroad* v. *Brotherhood of Railroad Trainmen*, where the Court found that an unincorporated association, like a corporation, may be sued under 28 U.S.C. § 1391(b) wherever it does business. See 387 U.S. at 559-63.

plaintiff corporation "resides" for purposes of venue in the district courts. In the court below, RLEA argued that the Hobbs Act uses the same definition of residence as the general venue statute for the district courts, 28 U.S.C. § 1391. It is unclear, however, whether a corporation or an unincorporated association always "resides" for purposes of § 1391 wherever it does business. Under § 1391(c) a corporation *may be sued* (and therefore "resides" for that purpose) in any state in which it does business, but this Court has not decided whether that definition of residence also applies to a corporate *plaintiff*. Indeed, over twenty years ago, in *Abbott Laboratories* v. *Gardner*, the Court noted that this "difficult" question, "with far-reaching effects," was unresolved. 387 U.S. at 156, n.20. Several courts of appeals have held, however, that § 1391(c) does *not* define the residence of a corporate plaintiff for purposes of venue.[20] Moreover, three courts of appeals have held that under § 1391(e)(4), which governs venue in actions against the United States and its agencies, a corporate plaintiff resides only in its state of incorporation.[21] Thus, if venue

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[20] See *Flowers Indus., Inc.* v. *FTC*, 835 F.2d 775, 777-78 (11th Cir. 1987); *Rosenfeld* v. *S.F.C. Corp.*, 702 F.2d 282, 283 (1st Cir. 1983); *Reuben H. Donnelley Corp.* v. *FTC*, 580 F.2d 264, 269-70 (7th Cir. 1978); *American Cyanamid Co.* v. *Hammond Lead Prods., Inc.*, 495 F.2d 1183, 1185-87 (3d Cir. 1974); *Manchester Modes, Inc.* v. *Schuman*, 426 F.2d 629, 629-33 (2d Cir. 1970); *Carter-Beveridge Drilling Co.* v. *Hughes*, 323 F.2d 417, 418 (5th Cir. 1963); *Robert E. Lee & Co.* v. *Veatch*, 301 F.2d 434, 436-38 (4th Cir. 1961), *cert. denied*, 371 U.S. 813 (1962).

In *Brotherhood of Locomotive Engineers* v. *Denver & Rio Grande Western Railroad*, 290 F. Supp. 612, 616 (D. Colo. 1968), *aff'd on other grounds*, 411 F.2d 1115 (10th Cir. 1969), the district court allowed an association plaintiff to predicate venue under § 1391 on the ground that it resided in a district in which it merely did business.

[21] *Flowers Indus., Inc.* v. *FTC*, 835 F.2d at 777; *Johns-Manville Sales Corp.* v. *United States*, 796 F.2d 372, 373 (10th Cir. 1986); *Reuben H. Donnelley Corp.* v. *FTC*, 580 F.2d at 268-70. In *Flowers Industries*, the court noted that seven district court decisions had

for a corporation or unincorporated association under § 2343 depends upon venue under § 1391, the courts of appeals need guidance from this Court as to the proper application of § 1391, a "difficult" and "far-reaching" question which the Court still has yet to resolve.

4. RLEA's theory of venue would provide unlimited choice of venue for entities like RLEA whose activities are nationwide in scope. As such, it is contrary to the policies behind the federal venue statutes. Section 2343 embodies considerations of convenience by permitting a corporation or unincorporated association to seek review either in the District of Columbia or in the circuit usually most convenient to it—the circuit in which it has its principal office (and in the case of corporations, in which it is incorporated). See *International Bhd. of Elec. Workers* v. *ICC*, 832 F.2d at 92-93. There is no need, however, to give corporations or unincorporated associations further choices by allowing them to shop for a supposedly favorable forum anywhere they do business in the country. See *id.* at 92; *American Civil Liberties Union* v. *FCC*, 774 F.2d at 26; *Reuben H. Donnelley Corp.* v. *FTC*, 580 F.2d 264, 269-70 (7th Cir. 1978) (construing § 1391(e)(4)).

Moreover, "[u]nlimited choice of venue * * * would conflict with the prevalent custom of entrusting judicial review to courts that had some direct connection to the parties involved in the administrative proceeding." *American Newspaper Publishers Ass'ns* v. *United States Postal Serv.*, 789 F.2d at 1091. This case illustrates what can happen when the limitations of § 2343 are not respected. None of the parties in the case has its principal office or is incorporated in the Eighth Circuit, and in order to support its right to bring its petition in that circuit, RLEA asserts an expansive interpretation of venue that would have permitted it to have brought the petition in

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held that a corporation resides only in its state of incorporation under § 1391(e)(4), but three had held that corporate residence under that statute is broader. 835 F.2d at 777 n.7.

any of the twelve judicial circuits. Were that the rule, any corporation or association with nationwide activities would be free to seek review of an agency order anywhere in the country.

Lower courts need guidance from this Court as to residence of unincorporated associations and, by extension, corporations, under § 2343. This case therefore presents an important unresolved issue of statutory construction and judicial administration warranting this Court's plenary consideration.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,

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January 29, 1990

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-1280

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Petitioner,

v.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA,
Respondents.

CHICAGO & NORTH WESTERN TRANSPORTATION COMPANY,
Intervenor-Respondent

FRVR CORPORATION,
Intervenor

Petition for Review of an Order of
Interstate Commerce Commission

Filed: October 30, 1989

Before ARNOLD, Circuit Judge, HEANEY, Senior Circuit Judge, and FAGG, Circuit Judge.

ORDER

On June 26, 1989, the Supreme Court granted a writ of certiorari in the above-entitled matter. It then vacated

the judgment of this Court and remanded the case to us for further consideration in the light of *Pittsburgh & Lake Erie Railroad Co. v. Railway Labor Executives' Association*, 109 S. Ct. 2584, 57 U.S.L.W. 4807 (June 21, 1989) (*P&LE*).

This Court requested the parties to this appeal to file letter briefs with respect to the application of *P&LE* to the instant case. After a careful review of the decision of the United States Supreme Court and the letter briefs, we adopt the suggestion of the United States as set forth in the letter brief of the Department of Justice and set aside *in toto* the declaratory ruling by the Interstate Commerce Commission.

We reiterate our opinion of November 21, 1988, that it is for the courts, not the Commission, to decide whether the Railway Labor Act and the Norris-LaGuardia Act must be accommodated to the authority of the Commission under section 10901 of the Interstate Commerce Act.

A true copy.

Attest:

/s/ Robert D. St. Vrain
Clerk
U.S. Court of Appeals
Eighth Circuit

U.S. DEPARTMENT OF JUSTICE

Washington, D.C. 20530

July 20, 1989

Michael E. Gans, Esquire
Chief Deputy Clerk
United States Court of Appeals
for the Eighth Circuit
U.S. Court & Custom House
1114 Market Street
St. Louis, Missouri 63101

Re: Railway Labor Executives' Association v.
Interstate Commerce Commission et al.
(8th Cir. No. 88-1280)

Dear Mr. Gans:

This is the response for the United States to your letter dated July 5, 1989, transmitting the Court's request for letter briefs regarding the application of the Supreme Court decision in *Pittsburgh & Lake Erie Railroad* v. *Railway Labor Executives' Association*, 491 U.S. —— (No. 87-1589, June 21, 1989) (*"P&LE"*), to the above-styled case on remand from the Supreme Court. The United States is not a party to No. 87-5071MN, the other case mentioned in the letter, and takes no position on that case.

The Court in this case is reviewing a declaratory ruling by the Interstate Commerce Commission that: (i) its approval of a transaction under 49 U.S.C. 10901 "preempts" collective bargaining over the transaction or its impact on railroad employees under the Railway Labor Act, 45 U.S.C. 151 *et seq.*, and (ii) its approval removes the Norris-LaGuardia Act bar to a federal court injunction against a strike. 29 U.S.C. 101 *et seq.* In its earlier decision, the Court effectively affirmed the first ruling but not the second. *Railway Labor Executives' Association* v. *ICC*, 861 F.2d 1082, citing *Burlington No. R.R.* v. *United Transp. Union*, 848 F.2d 856, 864 (8th

Cir.), cert. denied *sub nom. ICC* v. *United Transp. Union*, 109 S. Ct. 499 (1988). In a separate unreported judgment the Court declared the ICC's decision "affirmed as clarified by this Court."

The United States filed a brief as *amicus curiae* in the *P&LE* case, taking the position that the ICC's approval of a transaction under section 10901 preempts neither the Railway Labor Act nor the Norris-LaGuardia Act. The Supreme Court accepted that position. While holding the bargaining duties of the railroad to be limited in the circumstances of that case, it explicitly based those limitations "on our construction of the RLA and not on the premptive force of the ICA" (slip op., p. 19). It then squarely held that (slip op., pp. 21-22):

> [T]he unions served § 156 notices [under the RLA], which at least to some extent obligated P&LE to bargain until its transaction was closed. We find nothing in the ICA that relieved P&LE of that duty, nor anything in that Act that empowers the ICC to intrude into the relationship between the selling carrier and its railroad unions. We are thus quite sure that the NLGA forbade an injunction against that strike unless the strike was contrary to the unions' duties under the RLA.

In light of *P&LE*, therefore, both elements of the agency's declaratory ruling were wrong. Assuming that its declaration had any legal effect, the decision must be set aside *in toto*. Since no other relief was requested from the Commission, no remand is necessary or appropriate.

Sincerely,

/s/ Robert J. Wiggers
ROBERT J. WIGGERS
Attorney
Appellate Section
Antitrust Division

cc: Counsel of Record

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-1280

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Petitioner,

v.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA,
Respondents.

CHICAGO & NORTH WESTERN TRANSPORTATION COMPANY,
Intervenor/Respondent

FRVR CORPORATION,
Intervenor

Petition for Review of an Order of
Interstate Commerce Commission

Submitted: June 27, 1988

Filed: November 21, 1988

Before HEANEY, ARNOLD and FAGG, Circuit Judges.

HEANEY, Circuit Judge.

This matter is before the Court on the petition of the Railway Labor Executives' Association to review an or-

der of the Interstate Commerce Commission. In a 3-2 decision, the Commission granted the request of the Chicago & Northwestern Transportation Company and Fox River Valley Railroad Company for a "clarification" of its jurisdiction. The Commission held that the Norris-LaGuardia Act and the Railway Labor Act must be accommodated to the authority of the Commission under section 10901 of the Interstate Commerce Act, 5 U.S.C. § 551, *et seq. FRVR Corporation—Exemption, Acquisition and Operation—Certain Lines of Chicago and North Western Transportation Company—Petition for Clarification*, Finance Docket No. 31205 (January 29, 1988). The association contends that the Commission was without authority to issue the decision and that, in any event, its decision was wrong.

On May 31, 1988, this Court issued an opinion in which we held that, while the Railway Labor Act must be accommodated to the Commission's "authority to supervise and implement labor protective conditions in terms of sales, acquisitions, and abandonments by railway carriers insofar as this authority is necessary to 'assure fair wages and working conditions,'" there is "no inherent incompatibility" between the recent deregulatory efforts of Congress and the ICC and the continued viability of the Norris-LaGuardia Act. Thus, we declined to enjoin the United Transportation Union from instituting a strike against the Burlington Northern Railroad Company. *Burlington Northern R.R., Co. v. United Transportation Union*, 848 F.2d 856, 864 (8th Cir.), *reh'g denied* (September 23, 1988, as amended) (LEXIS, U.S. App. 13050).

We hold that it is for this Court, not the Commission, to decide whether the Railway Labor Act and the Norris-LaGuardia Act must be accommodated to the authority of the Commission under section 10901 of the Interstate Commerce Act, and we adhere to our decision on these questions in *Burlington Northern*.

FAGG, Circuit Judge, concurring and dissenting.

I agree this court, not the Commission, must ultimately decide to what extent the statutes implicated in this case are to be accommodated to one another. In a related context the court held the Interstate Commerce Act overrides the Railway Labor Act but not the Norris-LaGuardia Act. *See Burlington N. R.R. v. United Transp. Union*, 848 F.2d 856, 862-64 (8th Cir. 1988). Insofar as the court now "adhere[s] to [its] decision on these questions in *Burlington Northern*," *ante* at 2, I adhere to my dissent, *see Burlington N. R.R.*, 848 F.2d at 864-66 (Fagg, J., dissenting).

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-1280

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Petitioner,

v.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA,
Respondents.

CHICAGO & NORTH WESTERN TRANSPORTATION COMPANY,
Intervenor/Respondent,

FRVR CORPORATION,
Intervenor.

Petition for Review of an Order of
Interstate Commerce Commission

JUDGMENT

This cause was submitted on petition for review of an order of the Interstate Commerce Commission, administrative record, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the decision of the I.C.C. is affirmed as clarified by this Court. This Court, not the Commission, has ultimate authority to decide to what extent the statutes involved in this case are to be accommodated to one another in accordance with the opinion of this Court.

November 21, 1988

A true copy.

ATTEST: /s/ Robert D. St. Vrain
Clerk
U.S. Court of Appeals
Eighth Circuit

INTERSTATE COMMERCE COMMISSION

DECISION

Finance Docket No. 31205

FRVR CORPORATION—EXEMPTION ACQUISITION AND OPERATION—CERTAIN LINES OF CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY—PETITION FOR CLARIFICATION

Decided: January 28, 1988

This decision is issued in response to a petition filed by the Chicago and North Western Transportation Company (CNW) and FRVR Corporation. FRVR is a new corporation formed for the purpose of acquiring and operating certain rail lines of the CNW. Petitioners seek a statement of this agency's views as to our jurisdiction over labor issues arising out of the information of short-line railroads. The matter has become controversial in the past several years, due to the acceleration in the creation of regional and short-line railroads.

Since partial deregulation under the Staggers Rail Act of 1980 [1] nearly 200 short-line and regional railroads have come into existence—partially reversing the industry's long trend of exit and contraction. These new roads now operated approximately 13 thousand miles of rail lines with 4 thousand workers handling more than 1.3 million carloads yearly.

Up until the Staggers Act, the principal means of exit for large "Class I" railroads from unprofitable markets had been through abandonment. Substantial deregulation of motor freight under the 1980 Motor Carrier Act [2]

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[1] Pub. L. No. 96-448, 94 Stat. 1941-45.

[2] Pub. L. No. 96-296, 94 Stat. 793.

threatened to accelerate this trend through new and increasingly efficient truck competition. Abandonment, by its nature, is most often a painful, disappointing process. It normally entails the permanent loss of jobs and railroad service, even though it has not always occurred in markets that are inherently unserviceable by rail. Markets that produce losses when operated by Class I railroads can produce profits for smaller, more efficient local carriers. These new carriers are potentially beneficial to nearly all concerned. They preserve rail service for the local economies and provide traffic feed for the larger carriers, enhancing employment prospects for rail labor—both on the smaller lines and throughout a reinvigorated Class I system—and they foster optimal recognition of the energy efficiencies and environmental benefits of rail service.[3]

The trend away from abandonment and towards the formation of short-line and regional carriers developed in response to the new business environment created by the Staggers Act. This development was given impetus by a change in 1982 in Commission labor protection policy which was in part based upon a provision of the Staggers Act which establishes a branch line sale process in which labor protection was foreclosed by the statute.[4] In the past, the typical sale of a short-line carrier might have been conditioned upon comprehensive (and potentially quite expensive) labor protection.[5] By 1982 the

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[3] The National Rail Transportation Policy charges the Commission with the responsibility of ensuring the development of a sound rail transportation system, while encouraging fair wages and safe and suitable working conditions for labor. The Commission is also to encourage and promote energy conservation. *See* 49 U.S.C. 10101a.

[4] 49 U.S.C. 10905. *See Simmons* v. *ICC*, 760 F.2d 126 (7th Cir. 1985).

[5] *See e.g., Durango and Silverton Narrow Gauge Railroad Co.—Acquisition and Operation*, 363 I.C.C. 292 (1979), *aoff'd sub nom. Railway Labor Executives' Association* v. *United States*, 697 F.2d

Commission had determined that the expense of labor protection foreclosed short-line development, forcing the less attractive abandonment alternative or an abandonment and sale under the provisions of 49 U.S.C. 10905. As labor protection in short-line sales to new entrants is within the Commission's discretion, the Commission began to withhold protection in individual applicants[6] on the three-part theory that (1) in doing so rail service would be preserved, (2) the new railroads provided the best prospect for protecting the employment prospects of the affected labor and (3) it made no sense to force railroads to go through the more cumbersome process of abandonment under 49 U.S.C. 10903 and sale under 49 U.S.C. 10905 to achieve the same result. After consideration of scores of individual applications, the Commission decided in a 1986 notice and comment rulemaking that the development of new small railroads was overwhelmingly beneficial and should be encouraged and allowed to proceed with a minimum of regulatory cost and delay.[7] The Commission issued rules exempting certain classes of line sales from drawn out Commission regulation, retaining for itself the unqualified right to review and correct any unique problems that might arise out of exceptional circumstances.[8]

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285 (10th Cir. 1983) (Review Board decision noting that imposition of labor protection was discretionary).

[6] *See Knox and Kane Railroad Co.—Gettysburg Railroad Co.—Petition for Exemption*, 366 I.C.C. 439 (1982).

[7] Ex Parte No. 392 (Sub No. 1), *Class Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C. 10901, aff'd sub nom. Illinois Commerce Commission* v. *I.C.C.*, 817 F.2d 145 (DC Cir. 1987). This decision is in keeping with the National Transportation Policy of minimizing the need for Federal regulation (49 U.S.C. 10101a(2)), as well as the policies noted in footnote 3 above.

[8] The Staggers Act expanded the Commission's exemption authority. Further, as is stated in the Conference Report, the Commission is *actively* to pursue exemptions for transportation and is to have a policy of reviewing carrier actions *after the fact* to correct abuses. *See* H.R. Rep. No. 96-1430, 96th Cong., 2d Sess. 104-105.

The Commission's policy has been validated by practical results. New railroad formation quickened,[9] abandonments fell,[10] service was maintained and typically improved, and rail jobs that might otherwise have been lost were preserved.[11] Most observers supported and welcomed the Comimssion's policy initiative, but it has been consistently opposed by organized rail labor. Under the rules adopted in 1986, opposition to individual transactions is presented in petitions to revoke the grant of exemption. Such petitions have been filed in approximately 20 of the 120 transactions processed under the 1986 rules. Where petitions to revoke are filed, the Commission evaluates

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[9] New Railroad Formation

Year Est.	Number
1982	25
1983	20
1984	31
1985	28
1986	45
1987*	70

* Preliminary figure based on notices filed.

[10] Miles of Lines Abandoned

Year	Miles
1982	5151
1983	2454
1984	3083
1985	2343
1986	2087
1987	1932

[11] The Commission's Office of Transportation Analysis is engaged in continuing study and research on the effect of the Commission's policy and the short-line/regional phenomenon. This study has included one-site interviews with labor and management, as well as data collection and analysis. This analysis demonstrates that employment on the new lines, particularly the larger regional carriers, is typically drawn from the work force of the selling carirer. Further, while initial employment levels are below those of the departing carrier, employment on some lines has grown over time as improved service attracts new business to the lines.

the basis for the revocation request, and has well-defined authority to correct any abuses that are shown.[12] The Commission's authority includes the power to impose labor protective conditions through partial revocation,[13] although under the rules this step will be taken only where exceptional circumstances are shown. The Commission would consider as exceptional, situations in which there was misuse of the Commission's rules or precedent,[14] or where existing contracts specified that line sales were subject to procedural or substantive protection.[15] Further, the exemption will be modified where labor can demonstrate injury that was unique, disproportionate to the gains achieved for the local transport system, and which can be compensated without causing termination of the transaction or substantially undoing the prospective benefits of the Commission's existing policy for other communities and locales.[16]

The exemption proposal filed by CNW and FRVR corresponds quite well to our expectations and experience with the use of the Ex Parte 392 (Sub-No. 1) rules. At

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[12] *See Consolidated Rail Corporation—Declaratory Order—Exemption*, 1 I.C.C.2d 895 (1986), *cited approvingly, G&T Terminal Packaging Co., Inc.*, v. *Consolidated Rail Corp.*, C.A. 84-1173 Slip op. (D.N.J. October 23, 1986). *See also* legislative history of the Staggers Act in footnote 8 above.

[13] *See Maryland Midland Railway, Inc.—Exemption from 49 U.S.C. 11343 and 11301* (not printed), served January 6, 1987.

[14] *Cf.* Order of Investigation, served May 18, 1987, in F.D. No. 30965, *Delaware and Hudson Railway Company—Lease and Trackage Rights Exemption—Springfield Terminal Railway Company.*

[15] It is the Commission's standard labor protection policy in restructuring proceedings to preserve existing employment contracts insofar as possible, consistent with the merger, consolidation or abandonment authorized. *See* section 2 of the standard *New York Dock conditions*, 360 I.C.C. 84 (1979).

[16] *Cf. Northern Pacific Acquiring Corp. and Eureka Southern Railroad Co.—Exemption* F.D. 30555 (Decision served January 8, 1988).

issue are 208 miles of light density lines in Eastern Wisconsin in the area between Green Bay and Milwaukee. The paper industry is the principal source of traffic and holds the greatest potential for traffic growth on the FRVR line. But to achieve growth means reversing the paper industry's increasing reliance on truck service. A verified statement filed by Petitioners indicates that rail market share of the outbound paper market was 54 percent of the total in 1977, but had fallen to under 20 percent by 1986. The number of motor carriers operating in the region has doubled and price competition is strenuous. The lines of the CNW may now be under additional pressure since its rail competition (which had been the Soo Line operating at relatively standard Class I costs) is a new regional operator, the Wisconsin Central. Wisconsin Central, as organized, has distinct cost advantages that will make long-term competition by CNW almost certainly impossible, absent a substantial improvement in efficiency and productivity.[17]

To work its way out of this predicament, CNW seeks to sell its line to the newly formed FRVR. FRVR has a management team drawn from the Wisconsin area and from within the rail industry, with experience in running a small railroad and marketing rail transportation to the paper industry. It intends to draw its work force from existing CNW employees where possible, and anticipates that it will operate as a union-represented company.[18] Its wage rates will be approximately 85 percent

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[17] Two petitions to revoke the Wisconsin Central exemption (F.D. No. 31102) are now before the Commission.

[18] Verified Statement of S. P. Selby. Selby states that CNW employees currently working on the affected lines are granted right of first hire selected in accordance with qualifications, work records, fitness and ability, and physical and medical standards. Selby states further that he has met with an officer of the Railway Labor Executive's Association to work out a suitable arrangement for union representation of future employees. V.S., at 3-4.

of the Class I standard, and its work rules will give it substantial productivity improvement over the CNW operations. The company also anticipates use of an incentive bonus plan to further productivity. It will own its own engines, operate its own facilities, and rely principally on the CNW for car supply. It has trackage rights over CNW to connect into Milwaukee, and it has connections with other roads at points on the system. The company has already contacted shippers along the lines, and it filed 25 shipper letters acknowledging anticipated support and cooperation with its petition.

CNW estimates that the impact of the sale on its employee will be minimized by FRVR's commitment to the use of former CNW employees. For its part, CNW states that it has employment shortages elsewhere on its system, and that it will make these jobs available to workers effected by the FRVR sale. It anticipates that approximately 20 employees might still be left without employment either on FRVR or the CNW. It has offered a commitment of $30,000 per employee as a separation allowance for any employee unable to secure continued employment with either CNW, by exercising seniority, or with FRVR, under the right of first hire.[19] CNW has offered to meet with its unions to discuss this offer and related issues. According to Petitioner, the unions believe that such discussions must proceed under the auspices of the Railway Labor Act (RLA).[20] Bargaining under the RLA requires maintenance of the status quo, and permits resort to strikes, lockouts or other form of self-help if an impasse cannot be mediated. CNW takes the position that such bargaining gives labor the power to defeat the FRVR transaction, and is not required. However, informal discussions have taken place, but no agreements have been reached.

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[19] Verified statement of Robert Schmiege.

[20] 45 U.S.C. 151.

CNW has petitioned for a declaration as to the Commission's view of its role in resolving any labor disputes which may arise in connection with the implementation of this Commission authorized transaction.[21] CNW asserts such an action is required to ensure a smooth implementation of the authorized transaction.

The Railway Labor Executives' Association (RLEA) has filed in opposition to the Petition of FRVR and CNW. RLEA believes that the Commission is without jurisdiction to issue the clarifying decision requested by Petitioners, and that Petitioners' argument on the merits is based on erroneous legal interpretations.

DISCUSSION AND CONCLUSIONS

The first of RLEA's propositions appears to be based on a misapprehension of the nature of a declaratory order. It seems beyond question that the Commission has the authority to issue declaratory opinions.[22] RLEA does not directly address this authority, arguing instead that the Interstate Commerce Act (ICA) does not vest this agency with the power "to decide the applicability and scope of other statutes"—that the "Commission is clearly not the tribunal to determine how to resolve conflicting mandates of the ICA and other statutes." That is true enough, if understood to mean that the Commission's opinions on statutory interpretation are, when challenged, subject to judicial review and possible override. There is no dispute over the fact of judicial primacy, but

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[21] Pursuant to our class exemption rules, 49 CFR 1150.31 *et seq.*, the CNW/FRVR exemption became effective December 30, seven days after filing. Petitioners indicated that they intend to defer consummation until the Commission responds to their petition for clarification. A related petition for exemption of a control relationship between FRVR and its parent corporation has also been filed.

[22] Pursuant to 5 U.S.C. 554(e), an administrative agency is empowered in its discretion to issue declaratory orders to terminate controversy or remove uncertainty.

it does not follow that the Commission is foreclosed from expressing its viewpoint, or that such expressions may not issue in declaratory form, when related to the discharge of explicit statutory power, such as the power to approve or exempt the sale of a line of railroad. There is no need to deprive private parties and reviewing courts of the benefit of a clear statement of the Commission's viewpoint. The reason for declaratory opinions is to aid in clarifying and resolving controversies.

A part of the present controversy that requires clarification is whether the Railway Labor Act must be accommodated (in RLEA's words, subordinated) to the Interstate Commerce Act in the circumstances of an approved or exempted line sale arising under section 10901 of the ICA. A related issue is the immunity from injunction under the Norris-LaGuardia Act of a strike that threatens to prevent the consummation of a transaction so approved or exempted.

Until quite recently, it had been an established rule that the orders of the Commission approving the merger, sale, or abandonment of a line of railroad were not subject to collateral attack in the courts, and could not be frustrated by employee actions taken under the aegis of the Railway Labor Act or otherwise.[23] "Congress did not intend employees have such power to block consolidations which are in the public interest."[24] However, in a recent Third Circuit proceeding, *Pittsburgh & Lake Erie R.R.* v. *Railway Labor Executives' Association*[25] (*Lake Erie*), it has been held that a district court has no jurisdiction to enjoin a strike taken to block an ICC-approved sale. The Court based this holding on a finding that the Norris-

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[23] *Brotherhood of Locomotive Engineers* v. *C&NW*, 314 F.2d 424 (8th Cir.), *cert. denied*, 375 U.S. 819 (1963).

[24] *Missouri Pacific Railroad Company* v. *UTU*, 782 F.2d 107 (8th Cir. 1986), *cert. denied*, 107 S.Ct. 3209 (1987).

[25] No. 87-3664, Slip op., October 26, 1987.

LaGuardia Act need not be accommodated to the Interstate Commerce Act. This decision has had an immediate impact on the formation of small railroads,[26] threatening to halt the revitalization of the marginal railroad sectors—a restructuring that the Commission has found to be in the interest of carriers, labor, and the shipping public.

In its opposition response, RLEA takes the position that the Third Circuit *Lake Erie* decision is correct,[27] and that the Commission should conclude that the Interstate Commerce Act does not supersede the Railway Labor Act or Norris-LaGuardia. RLEA argues that *Brotherhood of R.R. Trainmen* v. *Chicago River and Indiana R.R.*[28] *(Chicago River) and Boys Markets Inc.* v. *Retail Clerk's Union*[29] *(Boys Market)*—Supreme Court "accommodation" cases relied on by Petitioners—are not controlling since they do not address the Interstate Commerce Act, but are limited to situations where aspects of national labor statutes were in conflict.[30] Hence, RLEA is

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[26] The *Lake Erie* decision has been followed by a Missouri federal district court, *Burlington Northern Railroad* v. *U.T.U.*, No. 86-5013, Slip op., October 26, 1987. (Missouri, Western District).

[27] The *Lake Erie* decision left open the issue of whether bargaining under the Railway Labor Act was necessary. The case was remanded to the district court on the RLA issue. The district court held the RLA applicable to the proposed sale and enjoined consummation of the transaction pending compliance with that act, finding that the Interstate Commerce Act does not operate to relieve the parties from their RLA obligations. *Railway Labor Executives' Assoc.* v. *Pittsburgh & Lake Erie Railroad*, No. 87-1745 Memorandum Opinion (Wes Dis. PA., No. 24, 1987). The case is back in the Third Circuit on appeal.

[28] 353 U.S. 30 (1957).

[29] 398 U.S. 235 (1970).

[30] Thus, in *Chicago River* an injunction against a strike was sustained where necessary to protect the Railway Labor Act's requirement that "minor" grievances be submitted to arbitration. In *Boys Markets* the court reached a similar conclusion under the Labor Management Relations Act.

in agreement with the *Lake Erie* court that statutory preemption of the Norris-LaGuardia no-injunction principle is limited to the need to accommodate other *labor* statutes. Without conceding its legitimacy, RLEA recognizes certain precedent to the effect that ICC authorization of a transaction under the merger provisions (49 U.S.C. 11343) will automatically relieve a carrier from the necessity of compliance with the Railway Labor Act to the extent necessary to go forward with the approved transaction. However, RLEA argues that this precedent has no relevance to 49 U.S.C. 10901 line sales. Unlike line sales, merger-orders are provided explicit preemption authority in 49 U.S.C. 11341 [31] and, as income protection and dispute resolution mechanisms are mandatory in merger proceedings,[32] labor is not "left out in the cold." [33] According to RLEA these are critical distinctions.

The broad issue presented by the CNW-FRVR Petition and the RLEA Opposition reply is whether the Interstate Commerce Act preempts the Railway Labor Act to the extent necessary to allow the parties to consummate a transaction previously authorized by the Commission. Every court that had ruled on this precise issue prior to

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[31] A carrier or corporation participating in a transaction approved or exempted by the Commission under subchapter III of Chapter 113 "is exempt from the antitrust laws and from all other laws . . . as necessary to let that person carry out the transaction . . ." By its terms, this section does not apply to line sales under Chapter 109.

[32] 49 U.S.C. 11347.

[33] RLEA cites to language in *Missouri Pacific R. Co.* v. *United Transportation Union*, 782 F.2d 109 (8th Cir. 1986). This case held that a railroad is exempted under ICA Section 11341(a) from the Railway Labor Act in connection with a transaction approved under 49 U.S.C. 11343. Labor emphasizes that the court there reasoned that inferring preemption of the RLA was reasonable because mandatory labor protection is applied 782 F.2d at 112. There are chronolgical problems with placing much reliance on the reasoning. The preemption provision was first enacted in 1920 mandatory labor protection in 1940.

the *Lake Erie* decision had answered yes.[34] By so doing, courts have recognized the importance of this agency's role in reconciling the conflicts between public need for an efficient transportation system, (including the need for fair and equitable labor relations) and the private disputes that arise invariably from consolidations and restructurings within the rail system. The ICC has inherent powers to impose labor protection where necessary to ensure labor equity,[35] including the power to impose income guarantees and comprehensive schemes for alternative dispute resolution—mechanisms which may include notice, negotiation, a status quo requirement and arbitration. From the 1930's, when the ICC actively became involved in the administration of labor protection, Congress has routinely affirmed and expanded the importance of the Interstate Commerce Act as a part of the complex of laws governing labor relations in the rail industry. The Transportation Act of 1940 [36] was a legislative affirmation of the Commission's authority to impose labor protection, mandating the use of labor protection in mergers and consolidations.[37] The Railroad Revitalization

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[34] *See Missouri Pacific R. Co.* v. *United Transportation Union, supra; Brotherhood of Locomotive Engineers* v. *C&NW*, 314 F.2d 424 (8th Cir.), *cert. denied*, 375 U.S. 819 (1963). *Cf. ICC* v. *Locomotive Engineers*, 55 USLW 4771 (June 9, 1987) (Concurring Opinion of Justice Stevens, joined by Justices Brennan, Marshall and Blackmun).

[35] *United States* v. *Lowden*, 308 U.S. 225 (1939); *ICC* v. *Railway Labor Assn.*, 315 U.S. 373 (1942).

[36] 54 Stat. 899.

[37] The *Lowden* court, while noting the pendency of the legislation which was to become the 1940 Act, concluded that the legislative initiatives did not militate against the conclusion that the Commission had implied power over labor protection in consolidations, but rather that Congress merely sought to make mandatory what was at the time discretionary. *United States* v. *Lowden, supra*, at 239.

and Regulatory Reform Act of 1976[38] mandated labor protection in trackage rights, lease transactions, and abandonments. The Staggers Rail Act of 1980 made labor protection mandatory in connection with the abolition of rate bureaus (Section 219(g) and feeder line sales—section 401), as well as giving the Commission explicit discretion to impose protective conditions on reciprocal switching and on the construction of new rail lines. For more than fifty years the Commission has exercised its authority in this field, frequently at the request and with the support of labor, and our decisions have had enormous impact on the shape of rail labor relations throughout this period.

It is primarily due to the policy decision to withhold such protections taken in Ex Parte 392 (Sub-No. 1) (and in earlier individual proceedings) that the Commission's authority is under challenge. However, the Commission's policy determinations have been repeatedly sustained, and the existence of our jurisdiction may not hinge on the policy choice made.

In the first place, labor has not been left out in the cold. Affected parties were free to participate in the Ex Parte rulemaking, and are free to petition for its reopening. Indeed, aspects of the rulemaking are now under reconsideration in a reopened proceeding.[39] Further, in individual cases through the revocation process parties are given the opportunity to show that the policy norms of the Ex Parte rulemaking ought not apply. Full participation before the Commission is an important end in itself as it helps to inform the Commission of the range of problem and circumstances confronting transportation. If current policy does not provide routine protection, it is because experience has demonstrated that the

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[38] 90 Stat. 31.

[39] *Class Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C. 10901*, Notice of Proposed Rulemaking served October 2, 1987.

formation of new lines would be thwarted, to the overall public detriment. Where exceptions are needed, the Commission has the authority to fashion a full remedy.

Jurisdiction is not determined by outcome. The Commission has exclusive and plenary jurisdiction over the sale, merger, or abandonment of rail lines.[40] This authority was granted by Congress as a part of a regulatory framework, to ensure a rail transportation system in the public interest. As a necessary component of this regulatory framework, the Commission has had to preempt on occasion the operation of other laws to the limited extent necessary to remove obstacles to Commission approval transactions. Such preemption of labor legislation has been upheld even in circumstances where the Commission did not provide labor protection under its auspices.[41] We believe this is the correct interpretation of the matter at issue.

The fact that a particular "labor outcome" does not dictate the extent or effect of ICC jurisdiction is a necessary correlative to the Commission's discharge of its responsibilities. That the concern for labor equity is only one of many conflicting aspects of National Transportation Policy should not be seen as a derogation of the agency's authority—rather it is precisely the reason why the Interstate Commerce Act must be recognized to have preeminence. It is the public policy of this Nation to regulate and supervise transportation at the national level so as to ensure the essential benefits of a critical aspect of commerce. While the means of regulation have changed markedly over the decades, the exclusive and plenary nature of the Commission's jurisdiction over consolidations, sales and abandonment has been consistently

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[40] *Brotherhood of Locomotive Engineers* v. *C&NW, supra; Chicago and North Western Transportation Co.* v. *Kalo Brick and Tile Co.*, 450 U.S. 311 (1981).

[41] *RLEA* v. *Staten Island Railroad Corp.*, 792 F.2d 7 (2d Cir. 1986), *cert. denied*, 107 S. Ct. 927 (1987).

upheld. In the discharge of our responsibilities, we are charged with the expert resolution of many-sided conflicts between disputants, public and private. The recitation above of the factors leading to our small-railroad policy illustrates the complexity of the process and information that led to our present policy.

As with all adversarial proceedings those which come before the Commission generate winners and losers, but it must also be clear that participants ought to, after exhausting lawful appeals aimed at our authority and reasonableness, be reconciled to the process. Allowing a dispersion of authority will compound the problems to the detriment of the public and the transportation system. In the matter at hand, it cannot be doubted that a strike to prevent ICC-approved abandonment is susceptible to injunction. But it is now contended that such a strike can be used to prevent the development of an advantageous alternative to abandonment, despite the fact that Commission jurisdiction over these two types of restructuring is, in all relevant aspects, identical. Our expertise and experience, combined with our system-wide responsibilities, lead us to the conclusion that neither the public nor labor is adequately protected by encouraging a system that prefers abandonment to rejuvenation. We do not believe the law is so structured as to compel that outcome.

Organized as it is, FRVR stands a far better chance of developing a self-sustaining rail operation than does CNW. Over the past quarter century the miles of road operated by CNW has decreased by a third.[42] Its management goals include further reduction in size, either through line sales or abandonment. Whether the lines at issue here could be abandoned immediately under exist-

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[42] *Moody's Transportation Manual* (1963 and 1987 issues) indicates that CNW operated over 15 thousand miles of road in 1962 (including miles operated under contract and trackage rights) but that total had declined to slightly over 10 thousand miles by 1986.

ing law has not been demonstrated. However, fierce trucking competition combined with CNW's comparative disadvantage in rail costs significantly increase the potential of future abandonment. Clearly, the National Transportation Policy will be advanced by permitting the sale of these lines to a willing, experienced and optimistic group of managers, who will in turn rely on experienced labor and a commitment to the local customer base in an attempt to revive and preserve competitive rail transportation for this region of Wisconsin.

This action will not significantly affect either the human environment or energy conservation.

It is ordered:

The Petition of CNW and FRVR for an order clarifying jurisdiction and other matters is granted.

By the Commission, Chairman Gradison, Vice Chairman Andre, Commissioners Sterrett, Lamboley and Simmons. Commissioners Lamboley and Simmons dissented with separate expressions.

NORETA R. MCGEE
Secretary

(SEAL)

COMMISSIONER SIMMONS, dissenting:

I would have denied the petition for clarification. I have supported the policy expressed by the majority becase I believe it has contributed, to some extent, to the preservation of rail lines that otherwise would have been abandoned. However, I do not agree with the majority's use of such glowing terms to describe the efficacy of the Commission's denial of labor protection in so-called "short" line sales under 49 U.S.C. 10901. The language of the decision strongly implies that there can be virtually no valid justification for departure from this policy. Indeed, the decision to grant the petition for clarification and enter this declaratory order to enunciate a policy that has

long been settled and affirmed in the courts indicates a certain lack of objectivity and fairness in the application of that policy.

We must not lose sight of our responsibility to weigh the interests of labor as a part of the public interest considerations associated with section 10901 sales. Neither this responsibility, nor the policy of which it is a part is enhanced by the gratuitous declaratory order entered here by the majority.

COMMISSIONER LAMBOLEY, dissenting:

While no one disputes the authority of the Commission to issue declaratory orders,[1] I believe to do so in this instance is an inappropriate use of process. In my view, there is insufficient evidence of controversy or uncertainty to warrant the issuance of this "clarifying" decision.

In invoking the class exemption process under Ex Parte No. 392 (Sub-No. 1)[2] petitioners have also requested that the agency declare that its authority under 49 U.S.C. 10901 supersedes the provisions of the Railway Labor Act (RLA)[3] and the Norris-LaGuardia Act.[4] They do so because of an alleged "climate of uncertainty" which it is claimed impedes consummation of the proposed transaction. Upon closer examination it becomes evident that the alleged controversy or uncertainty results from judicial decisions as well as petitioner's own conduct, neither of which the declaratory order requested from this agency will necessarily resolve. Indeed, this

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[1] 5 U.S.C. 554(e).

[2] Ex Parte No. 392 (Sub-No. 1), *Class Exemption for Acquisition and Operation of Rail Lines Under 49 U.S.C. 10901*, 1 I.C.C.2d 810 (1985).

[3] 45 U.S.C. 151, *et seq.*

[4] 29 U.S.C. 101, *et seq.*

order may well exacerbate matters not only for this case but for constructive activities in this forum on such issues in the future.

Petitioners argue such action is necessary because several recent court decisions [5] "reflects a misapplication of the accommodation doctrine and a misunderstanding of this Commission's role in addressing labor issues pertaining to transactions within its jurisdiction." The petitioners do not agree with the outcome of judicial action in which they did not participate, although the Commission did. Without more, the petitioners simply request that the Commission here render a "proper" interpretation of applicable law by declaratory order. Petitioners offer neither substantial reason nor purpose for their request as it may relate to judicial activity.

Additionally, the petitioners claim the Commission's declaratory order is necessary because, while the CNW has met with the rail unions and informal discussions have taken place, no agreements have been reached since the unions believe (apparently contrary to petitioners) that RLA procedures apply to such discussions. The petitioners do not explain why they simply do not file a request with the Commission to fashion and impose appropriate protective conditions, with post consummation negotiation and arbitration procedures, if need be. Such request for relief would squarely address alleged controversy or uncertainty concerns relating to the process and substance of negotiation.

In sum, neither judicial action nor voluntary conduct is sufficient premise upon which to establish controversy or uncertainty as cause for declaratory relief in this case.

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[5] *Railway Labor Executives' Association v. Pittsburgh & Lake Erie R. Co.*, —— F.2d —— (No. 87-3664, 3rd Cir. October 26, 1987) (*P&LE I*) and *Railway Labor Executives' Association v. Pittsburgh and Lake Erie R. Co.*, Civil Action No. 87-1745 (W. D. Pa. Nov. 1987), appeal pending *sub nom. Railway Labor Executives' Ass'n v. Lake Erie Co.*, No. 87-3797 (3rd Cir. filed Nov. 25, 1987) (*P&LE II*).

Further, quite apart from the lack of any legitimate, demonstrable need for declaratory relief, I fail to see that this order makes any significant contribution toward resolution of statutory "accommodation" issues. There is little doubt that the Commission does not have the requisite *jurisdiction* to interpret the applicability and scope of statutes other than the ICA. Certainly the agency may "express its viewpoint". Such as it is. It is a position which has been expressed repeatedly in court briefs [6] submitted by the Commission, and is well known. This decision appears to be little more than an attempt to support arguments in briefs previously filed and bolster prior discussion in Ex Parte No. 392 (Sub-No. 1).[7] It is self-serving and offers no new instruction.

Moreover, of particular concern here, is the eagerness to justify a well known position, the effect of which places the Commission in the position of apparent bias. This is especially true here because, in addition to the extended discussion of the Ex Parte No. 392 (Sub-No. 1) and preemption matters, this decision addresses specific employment security and displacement issues in this transaction, and consequently, in anticipatory fashion, effectively prejudices and precludes meaningful consideration of any subsequent petition for revocation raising protective condition issues. The lack of agency constraint here has unfortunate ramifications.

Finally, after all things are considered, it is fair to say that any instability or uncertainty over employment security and displacement issues is largely a consequence of our own doing by decisions such as this, as well as those in Ex Parte No. 392 (Sub-No. 1) and its progeny.

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[6] See for example the Commission's brief in *P&LE II*, also a letter to District Judge dated October 8, 1987.

[7] Ex Parte No. 392 (Sub-No. 1), *Class Exemption for Acquisition and Operation of Rail Lines Under 49 U.S.C. 10901*, 1 I.C.C.2d 810 (1985).

Legitimate transportation transactions under the ICA have been authorized in a manner which encourages and permits unilateral abrogation of legitimate, collective bargaining agreements and statutory requirements of the RLA, without procedural or substantive accommodation of respective interests. Mutuality and reciprocity in collective bargaining contemplated by the RLA and resultant market-based arrangements have been nullified by our approach. It is small wonder then that the incentives for problem solving and dispute resolution through the negotiation process have been diminished and relations have become unstable.

It has become abundantly clear in these cases that the essence of the dispute is labor relations issues, not transportation.[6] Assuming jurisdiction, the Commission's current fixed position prevents adjustment and resolution in this forum.

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[6] See, also letter dated December 2, 1987 in Finance Docket No. 31163, *Winoma Bridge Railroad Company Trackage Rights—Burlington Northern Railroad Company.*